TAN LAI SAN

v.

PENDAKWA RAYA

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[SELANGOR CRIMINAL RETRIAL NO. 51-233-87]
26 MARCH 1991

CRIMINAL LAW: *Erection of unauthorised building - Appellant ordered to demolish - Order ignored - Appellant pleaded guilty - Appeal - Appeal was without merit - Dismissed - Sentencing postponed pending further consideration of evidence - Roads Drainage and Buildings Act 1974, ss. 70(1), 70(13), 70(15).*

On July 1987, the appellant was charged under s. 70(1) of the Roads Drainage and Buildings Act 1974 ("the Act") for having erected a building without prior written approval of the local council MPPJ and was convicted under s. 70(13)(c) of the Act.

The appellant was unrepresented and pleaded guilty. The prosecuting officer Mr. Singam applied for an order under s. 70(15) of the Act which provides that the Magistrate shall make a mandatory order requiring any person convicted under s. 70(13) to alter in any way or demolish the unauthorised building.

The appellant ignored the order. On 21 September 1987, he then appealed to the High Court. No stay of execution was granted. On 14 November 1987, the parties appeared before the Magistrate who ordered the building to be demolished within ten days.

In the High Court, it was argued that the demolition order was void on the grounds that the prosecuting officer of the council was not a public officer authorised on behalf of the MPPJ to apply for the demolition order and that the appellant had no reasonable opportunity to show cause why the demolition order should be made against him.

Held:

[1] The authorities relied on by the appellant's Counsel were decided under the old Town Boards Enactment (Cap. 137), whereby the Court was given a discretion whether to grant a demolition order vested in the Magistrate. However, the current statute provides no such discretion and is mandatory.

[2] The appeal on the validity of the demolition order was without merit and had to be dismissed.

[3] The proper sentence in the case called for further investigation as the evidence revealed that not only had the unauthorised building not been demolished by the appellant, but it was completed after the conviction and had been actively inhabited.

[4] The appellant had shown a callous disregard for the law and the case was adjourned to 6 May 1991 to alow for further consideration of any material evidence from the parties as to whether a daily penalty and whether any other orders are required in the interests of justice.

[Appeal dismissed. Case adjourned to consider further evidence before sentencing.]

JUDGMENT

Mahadev Shankar J:
(Judgment No. 1)

On 7 July 1987 Tan Lai San (Tan) was charged in the Magistrate's Court Petaling Jaya under the Roads Drainage and Buildings Act 1974 (the Act) that he had erected a building in Petaling Jaya without the prior written approval of the Majlis Perbandaran Petaling Jaya (MPPJ) and thereby committed an offence under s. 70(1) and punishable under s. 70(13)(c) of the Act.

Section 70(15) of the Act provides that a Magistrate shall, on the application of a public officer authorised by the local authority in writing in that behalf, make a mandatory order requiring any person convicted of an offence under the provisions of subsection (13) to alter in any way or demolish the building.

Tan was unrepresented. He pleaded guilty. In mitigation he submitted that he had already put in the plan to the MPPJ. But the prosecuting officer Mr. Singam informed the Court that the plan was not approved and asked for a demolition order of the said building.

Section 70(13) provides for a fine on conviction not exceeding RM10,000 and also a further fine of RM250 for every day during which the offence is continued after conviction.

The Magistrate ordered the building demolished by 13 August 1987.

On 12 August 1987 Tan and Singam came before the Magistrate again. Mr. Singam informed the Magistrate that upon inspection on 11 August 1987 the building ordered to be demolished had not been demolished yet .

The defendant then applied for three months to await the result of his application. The Magistrate adjourned the matter to 14 September 1987 for demolition or to show cause.

On 21 September 1987 Tan applied for and obtained from the High Court leave to appeal and filed a notice of appeal. On 24 September 1987 Mr. Singam so informed the Court and requested another date to confirm the outcome of the appeal.

Tan was legally represented in the High Court upon his application for leave and continued to be legally represented thereafter. No stay of execution was granted.

On 14 November 1987, the parties appeared before the Magistrate. Mr. Singam informed the Court that the building had still not been demolished. Defence Counsel asked for another date but the Magistrate specifically ordered that the building be demolished in ten days' time. It was not demolished as ordered or at all.

Before me, on appeal Encik Phang Ah Hee attacked the demolition order on two grounds. It was contended:

(1) Firstly that the record did not show that Mr. Singam was a public officer authorised in that behalf, to apply for the demolition order.

(2) Secondly that Tan had no reasonable opportunity to show cause why the demolition order should be made against him.

On both counts it was urged that the demolition order was void.

Tan's Counsel relied on *Lee Yew v. PP* [1953] MLJ 211 and *Simun v. PP* [1955] MLJ 134.

Care should be taken to note that these decisions are under the old Town Boards Enactment (Cap. 137), s. 92(1) whereby upon conviction if the Chairman of the Town Board or his Deputy applied for a demolition order the Court **may** make such an order. It was further held in those cases that reasonable notice of the intention to make such an application should be given to the offender.

In the current statute there is no discretion vested in the Magistrate. Section 70(15) is imperative in terms. Whether the notice of intention to make the application was given and whether such notice was reasonable in each case is a question of fact.

In the present case Tan was present when the application was made. Neither of the points taken in this appeal were made in the Court below and for the reasons which now follow it is clear that had they been taken they would have failed.

Mr. Singam was present in Court when this appeal was argued. I am satisfied that at all material times he was an officer of the MPPJ holding a laminated authority card in writing stating that he was a Legal officer of the MPPJ and that he had been vested with all the powers and responsibilities conferred by the Act and the Regulations made thereunder. As for notice of intention to make the application Tan was present when it was made and did not contest it in the first instance. Subsequently he applied for time. When the Magistrate reiterated on 14 November 1987 that the building should be demolished in ten days (i.e. by 24 November 1987) he had his Counsel with him, and still did not contest.

Manifestly therefore this appeal was without merit and had to be dismissed on the validity of the demolition order.

But the proper sentence in this case called for further investigation because I have been informed from the Bar Table that not only has this unauthorised building not been demolished by Tan, but that it was completed after conviction and has been actively inhabited since then till today; presumably without a Certificate of Fitness for Occupation.

Prima facie this reveals a callous disregard for the law and I adjourned this matter to 6 May 1991 for further consideration of any material evidence either party may wish to submit to this Court as to whether the daily penalty should be imposed from 24 November 1987 or some other date and whether any other orders are required in the interests of justice.

Tan Lai San v. Pendakwa Raya

CRIMINAL LAW: *Appellant had pleaded guilty - Mitigating factor - No daily penalty imposed - Appellant had reasonably entertained hope that his appeal would be allowed - Local authority failed to seek alternate remedies - Section 91(3)(a) allows demolition of the building by local authority themselves - Not appropriate to impose retrospective penalty going back to the conviction - Section 70(15) provides no daily penalty - Up to local authority to seek appropriate remedy.*

In the High Court, the appeal was dismissed but sentencing was postponed to 6 May 1991 for further consideration as to whether daily penalty as provided for under s. 70(15) should be imposed from 24 November 1987 or some other date in the interest of justice.

Held:

[1] No daily penalty was imposed for the following reasons.

(a) The appellant had pleaded guilty, which in itself is a mitigating factor.

(b) Though he wilfully disregarded the order, he reasonably entertained some hopes that his appeal would be allowed. For if he had demolished the building which had been built at great expense, his appeal if it succeeded would have been wholly nugatory.

(c) The MPPJ had all the means and power to enforce the demolition order. By s. 91(3)(b) of the Act, the MPPJ could have demolished the building and recovered the expenses from the appellant.

(d) The proper time for the imposition of the daily penalty under s. 70(13) of the Act is upon conviction. The Magistrate could have imposed the additional sentence if the situation so warranted. However, the MPPJ had failed to act and it is not appropriate to impose a retrospective penalty.

(e) Section 70(15) under which the mandatory order was made does not contain any provision for a daily penalty. It is provided for in s. 91(3)(a). This is a matter for the trial Court which made the mandatory order.

(f) It is for the MPPJ to decide whether they should demolish the building themselves with prior notice of their intention to do so and/or whether they should through the Magistrate's Court give notice to the appellant to show cause why the daily fine should not be imposed and if so in what sum and from what date.

[No daily penalty imposed.]

Cases referred to:
Lee Yew v. PP [1953] MLJ 211 ***(dist)***
Simun v. PP [1955] MLJ 134 ***(dist)***

Legislation referred to:
Street, Drainage and Building Act 1974, ss. 70(1), (13)(c), (15)
Town Boards Enactment (FMS Cap 137), ss. 91(3)(a), (b), 92(1)

For the appellant - Phang Ah Hee; M/s. Phang & Co.
For the public prosecutor - Rosli Zain

Judgment No. 2 (12 March 1992)

On 7 July 1987 Tan Lai San (Tan) was charged in the Magistrate's Court Petaling Jaya for an offence under s. 70(1) of the Roads Drainage and Buildings Act 1974 (the Act) punishable under s. 70(13)(c) of the Act. This charge relates to erecting a building without prior written approval of the MPPJ.

Tan pleaded guilty. This in itself is a mitigating factor. He further submitted that he had put in a plan. This had not been approved. The maximum punishment upon conviction is a fine not exceeding RM10,000 and also a daily fine of RM250 per day for each day the offence is continued after conviction.

Under s. 70(15) of the Act the Magistrate shall on application make a mandatory order for the demolition of the building. Immediately after the sentence aforesaid, the Magistrate made an order for the demolition of the building by 13 August 1987.

This order was not complied with. Tan obtained leave and filed an appeal against sentence. Whilst the appeal was pending the matter came up before the Magistrate as to the status of the demolition order. This was on 14 November 1987. The Magistrate ordered the building demolished in ten days.

It was not. Nothing further was done by the parties except to await the outcome of the appeal which was against the validity of the demolition order.

I dismissed the appeal on 26 March 1991 and gave written reasons for doing so. In the circumstances of the case as they were known to me at that time I adjourned the matter to 6 May 1991 for further consideration as to whether the daily penalty of RM250 should be imposed from 24 November 1987 or some other dates in the interests of justice.

Tan affirmed an affidavit on 15 April 1991 and filed the same. He said he had paid the fine of RM2,500. He also said that two officers in the MPPJ named Rusli and Syed told him that for a payment of RM4,500 they could put up the plans for the building and ensure its approval by channelling it through one Wong Kim Men. They told him he could proceed with the building.

The building inspector Cik Saleha informed him otherwise on 24 September 1986. The ground floor was as then already completed at a cost of RM70,000. Tan claims he then saw Ruslan and Syed who assured him that all will be well when the plans were suitably amended. He did not demolish the building because he hoped to get the plans approved.

Whilst the appeal was pending he says the Legal Advisor of the MPPJ suggested that he apply for a postponement of the consideration of the requirements of the MPPJ as to the fate of the building. Such an application was made and no reply was received. In the circumstances he appealed to the Court not to impose the daily fine.

This affidavit was responded to by an officer of the MPPJ who made his averments on the basis of the records of the MPPJ. He said that there was no record of any persons employed by the MPPJ by the name of Ruslan or Syed. He further stated that Tan had in fact submitted plans for a two-storey bungalow but the building completed was being used for commercial purposes.

Having considered all the circumstances of the case I decided that no daily penalty should be imposed for the following reasons.

Tan had pleaded guilty. Consequently he could appeal only against sentence. He could not appeal against his conviction.

His disregard of the demolition order was admittedly wilful but whilst his appeal against sentence was pending he could reasonably have entertained some hopes that it would be allowed. From his point of view if he demolished the building he had constructed at such great expense to himself, his appeal, if it succeeded would have been wholly nugatory.

The MPPJ on the other hand had all the means and power to enforce the demolition order if Tan did not move within the required time. By s. 91(3)(b) of the Act the MPPJ can enter the premises and demolish the same and recover the expense from Tan in accordance with the law relating to fines. This option was available to the MPPJ throughout. Why did they not avail themselves of it? In my view there is no difference between a "mandatory order" obtained under s. 70(15) and a mandatory order obtained under s. 91, even though the procedural route towards obtaining it may be different.

In retrospect it appears to me that the proper time for the imposition of the daily penalty under s. 70(13) of the Act is upon conviction. In the first instance it was for the Magistrate to impose that additional sentence upon Tan if the circumstances so warranted. Where the local authority has failed to act, I do not think it appropriate for this Court to impose a retrospective penalty going back to the conviction. An appeal is after all a rehearing, and the daily fine which is now in issue is the daily fine upon conviction for an offence under s. 70(13).

Section 70(15) under which the mandatory order was made in this case does not contain any inbuilt provisions for a daily penalty. This is provided for in s. 91(3)(a). It cannot be imposed until the Court has heard evidence and tried a separate issue i.e. that the person to whom the order has been addressed has not used all due diligence to carry out such order. In the first instance this is a matter for the Magistrate's Court which made the mandatory order.

Consequently it is for the MPPJ to decide what they wish to do next that is to say (1) whether they should demolish the building themselves in which case it seems to me that if only as a matter of courtesy they should give prior notice of their intention to do so and/or (2) whether they should through the Magistrate's Court give notice to the appellant to show cause why the daily fine should not be imposed and if so in what sum and from what date.

Also found at [1992] 4 CLJ 1917